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April 8, 2003

Mr. Corbin R. Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No 2002-34

Dear Mr. Davis:

I am writing in regards to ADM File 2002-34, which addresses the proposed court rule amendments contained as part of the Court of Appeals delay reduction plan. While the elimination, or any step approaching it, of the delay currently seen as at the Court of Appeals is a laudable goal, I must stand strongly against the proposed amendments, as they would both do little to further that goal and a great deal, I expect, to complicate the professional existence of both the Court of Appeals and those attorneys who practice before it.

As I expect that these rules will generate a fair amount of commentary, and also expect the trend in such efforts may be the most lopsided the Court has seen in recent times, my statement above will likely be sufficient for this letter to be counted in the appropriate pile. That said, I will spend a bit of time discussing why I think these amendments are ill-advised, as the potential harm certainly warrants a bit of attention.

The ad hoc "delay reduction committee" of the Appellate Practice Section has, of course, addressed this matter, and the committee's report is a sound view of the subject. I am certain that no effort of mine will approach the scope of expertise displayed in that work, and also doubt that my voice will resonate any louder than the good number of seasoned practitioners, many of whom are well known to the Court, who participated in its crafting. Even so, I will offer the perspectives that come to mind, as they are the ones that matter to me now as well as the ones that mattered to me when I toiled down the hall from your old office.

From the point of view of the Court and its staff, lousy briefs are just that, lousy. Good work takes time, and both this Court and the Court of Appeals have often recognized the value of adequate briefing to the consideration of any case. Time for time's sake, to be sure, may not be a

good idea, as procrastination helps no one, but, on the other hand, no practitioner coming before the Court of Appeals has just one case, and whether the other cases are a multitude of appellate matters, for the specialists appearing before the Court, or trial matters, for the prosecutors and criminal defense attorneys, or the hodgepodge of cases seen in many general practices, other things *will* be pressing, and finding the time to craft a decent appellate brief takes just that, a good bit of time.

As things stand now, there are limits, but sensible and somewhat flexible ones. The proposed changes would utterly destroy this flexibility, and leave in its place an absolute and unwavering mandate of haste. The removal of extensions by stipulation is particularly troubling, as a single extension each way is hardly extreme, and cannot be said, when agreed to by the parties, to prejudice anyone. The effective elimination of extensions by motion does no more good, as while allowing extensions by stipulation certainly ought to continue, limiting extensions to only those agreed upon would likely encourage some level of gamesmanship, particularly among attorneys who do not focus solely in appellate practice.

While the effect the proposed changes will have cannot entirely be known, one thing is certain; if these proposed changes are adopted, a good many more oral arguments will be forfeited under MCR 7.214(A) due to late briefing. The Court of Appeals current practice of scheduling a multitude of oral arguments for the same short time block already offers a not all that subtle hint that the Court does not expect or desire advocates to use all, or even most, of their allotted time. From this, some would say, the value the Court places on oral argument is readily apparent, a view that might be reinforced by the increasing use of summary decision panels (which recently have come to include dissenting opinions). Either way, if the intent is to see a reduction in the oral argument case call, the goal of judicial efficiency (in appropriately and speedily deciding cases) and probably even judicial economy (in getting the morning call over quicker and the Panel back to attending to other matters) would seem better served by a method relying on MCR 7.214(E)(2)'s statement of reasons for oral argument or the merits of the case, rather than an ad hoc triage accomplished by strict enforcement of inflexible and very narrow time limitations.

After considering the changes to my practice the proposed rules would necessitate, it is readily apparent that the results would be devastating to both my practice and the state of appellate practitioners in general. As a sole practitioner whose business is over 90% appellate, and over 90% of that in the Court of Appeals and this Court, the effects of these changes on my firm would be nothing short of draconian. The caseload that would be manageable would shrink dramatically, and become horribly inflexible. With less cases to be taken, the fee per case would have to rise, making the already expensive appellate process even more out of reach for many clients, particularly those in family law situations, where the importance of the issues often cannot be measured in dollars. The ability of most any appellate practitioner to take on emergency appeals would likely become limited to non-existent, and cases such as *Ellis v Schick, COA# 247329; Wayne Circuit #99-904126-DM*, in which a grossly improper change of custody was brought to the attention of the Court of Appeals and reversed within 56 *hours* (thanks to the ability to seek an extension by motion, with the reasonable expectation it would be granted pursuant to IOP 7.212(A)(1), in *Deyo v Deyo, COA #245210; Livingston Circuit #01-30982-DM*, in which the brief was also due within the same week) would become a thing of the past. A good

number of parties with legitimate issues and true emergencies might well find no counsel able to take them on without prejudicing their currently clients by jeopardizing a suddenly inflexible deadline (and if a strict "good cause" measure is adopted for extensions, no sane counsel would be able to bank on the Court of Appeals granting relief for anything short of his or her own hospitalization, making all deadlines totally inflexible).

Finally, of course, something would have to give. For myself, I expect it would have to be, beyond the emergencies, the appointed cases (and eventually probably some others as well). I take a few MAACS cases a year, losing money, of course, on every one. I believe that every attorney has a duty to undertake *pro bono* work in their area of practice and, thus, I take on these cases. I doubt I could do so under the timeframes proposed in the delay reduction rules. Indeed, if the proposed rules are adopted, no appellate practitioner could reasonably enter a case without first consulting the briefing calender (and while this is done by all even today, there is always some leeway for more urgent matters), making the intermittent and unpredictable arrival of appointed cases something few could tolerate. While others probably could do the job (though the numbers willing continue to shrink), I expect most would agree that the quality of representation in appointed appellate cases could be better, and that funneling them away from full time appellate practitioners is bound to do no good towards that goal.

Judge Whitbeck commands a good deal of respect from this Court, and he is certainly both an able writer and an able mind. The publication of these proposed rules, in the face of opposition that cuts across all the normal lines of plaintiff versus defendant and prosecution versus defense counsel[1], has left many to think this train has already left the station. This may be, and, if so, this writing will hardly derail the effort. If there is, however, still consideration to be had, I would hope it would focus, very closely, on exactly what good is expected to come from something that most everyone involved unanimously says will be bad for them personally, the Bench and Bar in general, and the particular cases and parties most of all. The Court of Appeals "warehouse" is a testament to many things (and many of those in the past), but the amount of time allowed for briefing is not one of them. Filing the warehouse up faster will do no good, and, if it is finally one day eliminated, passing along hastily prepared briefs will do little to assist the Panels which will themselves be under increasing pressure to produce (with, given this state's currently budgetary crisis, probably less staff to support their efforts). I expect some practitioners, like myself, are already making plans to restructure and refocus their practices, as these rules will make the appellate business, already a very precise and stern area of procedural law, outright inhospitable, even to the most seasoned appellate attorneys. There are problems with the system, to be sure, but surgery this radical will only leave the patient deformed, and while it may change the diagnosis, it will hardly cure the disease.

I appreciate the attention of the Court and its staff to this document. Should any readers have

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[1] Indeed, undersigned counsel, a member of the Appellate Practice, Family Law, Criminal Law and General Practice Sections of the State Bar has yet to see *any* comments, beyond those offered by Judge Whitbeck, in support of these proposals, and is certainly not yet aware of a single practitioner who either welcomes them or thinks them likely to achieve their stated goal.

questions or concerns regarding this offering, of course, they are welcome to contact me. Thank you.

Sincerely,
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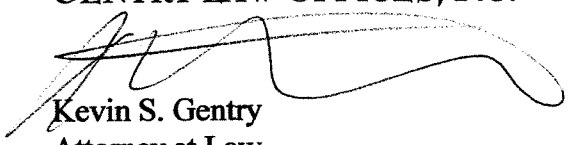

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